

# Domestic Violence and GALs/CASAs: Legal and Ethical Responsibilities in Child Custody Cases

## Outline & Informational Memorandum

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***NOTE: (1) This memorandum has been adapted from a "letter" written in 1999 to an attorney guardian ad litem (GAL) in the context of a child custody dispute involving allegations of domestic violence. I have edited this document to add much-needed references and other revisions. Although I have added footnotes to acknowledge more recent research or information, much of it online,<sup>1</sup> I have not conducted a comprehensive database search and urge readers to review the published literature. To the best of my knowledge, Indiana Code citations are current. Lastly, readers will note a "mixed" citation style for which I apologize in advance! (2) The outline was originally created—from the GAL "letter"—for a presentation on the ethical and legal responsibilities of guardians ad litem (GALs) and court appointed special advocates (CASAs) in matters involving domestic violence at the 2001 Annual Meeting for GAL/CASA Directors and Staff (sponsored by the Indiana Office of CASA/GAL in Indianapolis, Indiana).<sup>2</sup>***

***The purpose of providing this document to others is informational only; it is not to be construed as a legal document. If you have questions involving legal issues, please contact an attorney.***

***M.R.B., May, 2004***

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<sup>1</sup> See Violence Against Women Online Resources, Document Resources, <http://www.vaw.umn.edu/library>; Minnesota Center Against Violence and Abuse (MNCVA), Articles and Research, <http://www.mincava.umn.edu/library/articles>; "Family Violence Issue," Juvenile and Family Court Journal, Fall, 2003, Vol. 54, No. 4; The Domestic Violence Project of Silicon Valley, Research Links, <http://www.growing.com/nonviolent/index.htm>; "References on Domestic Violence," by Daniel Saunders, Ph.D, University of Michigan, School of Social Work (updated 8/22/03), <http://www.ssw.umich.edu/research/saundddan/reprint9.pdf>.

<sup>2</sup> A Word version of the outline and memorandum can be obtained via email or regular mail by contacting the author.

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### Outline adapted from Informational Memorandum

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# INFORMATIONAL MEMORANDUM

## Domestic Violence and GALs/CASAs: Legal and Ethical Responsibilities In Child Custody Cases<sup>3</sup>

**I. The GAL has an affirmative duty to screen for domestic violence and make custody/visitation recommendations according to statutory mandates, relevant professional literature and research, and “best practices” standards.<sup>4</sup>**

**A. Indiana law mandates the consideration of domestic violence in determining the best interests of the child.**

IC 31-17-2-8, *Custody Order*, states, in part: “The court shall determine and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following: . . . (7) *Evidence of a pattern of domestic violence by either parent.*”

This statute, in conjunction with the GAL’s obligation “to represent and protect the best interests of the child” (IC 31-17-6-3), incontrovertibly requires that the court, and court officers to whom evaluation and recommendation duties are delegated (i.e. GALs), “consider” a pattern of domestic violence prior to entering a judgment, order, recommendation or report regarding custody or visitation. *The Model Code on Domestic and Family Violence* (“Model Code”) stipulates that where the court has made a finding of domestic or family violence, it must “elevate the safety and well-being of the child and abused parent above all other “best interest” factors in deliberations about custodial options in . . .disputed custody cases” (Sec. 402, Commentary, p. 33). Additionally, a GAL in Indiana must be mindful of IC 31-17-2-8.3, which creates a “rebuttable

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<sup>3</sup> For purposes of this memorandum, the term “GAL” or “GALs” will be used to refer to both guardians ad litem (GALs) and court appointed special advocates (CASAs).

<sup>4</sup>*Are ‘Good Enough’ Parents Losing Custody to Abusive Ex-Partners?* “High conflict families are disproportionately represented among the population of those contesting custody and visitation. These cases commonly involve domestic violence, child abuse, and substance abuse. Research indicates that custody litigation can become a vehicle whereby batterers and child abusers attempt to extend or maintain their control and authority over their victims after separation. Although allegations of child abuse and domestic violence are not less likely to be unfounded when first raised in the context of custody/visitation, officers of the court tend to be unreasonably suspicious of such claims and...too often custody decisions are based on bad science, misinterpretation of fact, and evaluator bias. As a result, many abused women and their children find themselves re-victimized by the justice system after separation. The research examining this issue is summarized below.”

<http://www.leadershipcouncil.org/Research/PAS/PAS1/DV/dv.html>

presumption that the court shall order that the noncustodial parent's visitation with the child" be supervised if "the noncustodial parent has been convicted of a crime involving domestic or family violence that was witnessed or heard by the noncustodial parent's child."

**B. "Consideration" of domestic violence in determining "best interests" of the child requires that the GAL be trained regarding the prevalence and dynamics of domestic violence and engage in an investigation, evaluation and recommendation process informed by case and statutory law, relevant social science and psychological literature, and "best practices" standards, including the provision of "culturally competent" services.**

## **1. Prevalence and impact of domestic violence**

Domestic violence is one of our country's—and the world's—most pressing social and public health problems. The Family Violence Prevention Fund, citing the Department of Justice, Bureau of Justice Statistics Crime Data Briefs, the Center for Disease Control and other reliable sources, provides current annotated statistics on its website that profoundly underscore the mandate that GALs be trained regarding the prevalence and the dynamics of domestic violence.<sup>5</sup>

Among these data are estimates that up to three million women are physically abused by their husband or boyfriend every year. While men accounted for approximately 15 percent of victims (103,220 total)," intimate partner violence is primarily a crime against women. In 2001, women accounted for 85 percent of the victims of intimate partner violence (588,490 total)" (Family Violence Prevention Fund, "Get the Facts," online).<sup>6</sup> Pregnant women are especially vulnerable, with as many as 324,000 women experiencing intimate partner violence annually during pregnancy. Women are also much more likely than men to suffer serious physical injury *and* death as a result of intimate partner violence. In 2000, women were nearly three times more likely than men to be killed by an intimate partner (1,247 women vs. 440 men); intimate partner homicide is the leading cause of death for pregnant and recently pregnant women (*Id.*).

Domestic violence is an enormous public health issue. More than one-third of women seeking treatment in emergency rooms for violence-related injuries in 1994 were injured by a current or former spouse, boyfriend or girlfriend. "The health-related costs of rape, physical assault, stalking and homicide committed by intimate partners exceed \$5.8 billion each year. Of that amount, nearly \$4.1 billion are for direct medical and mental health care services, and nearly \$1.8 billion are for the indirect costs of lost productivity or wages" (*Id.*).

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<sup>5</sup> Family Violence Prevention Fund, "Get the Facts," <http://endabuse.org/resources/facts>. The data and footnotes in "Get the Facts" are included as Appendix A on p 39.

<sup>6</sup> Because males account for the vast majority of incidents involving intimate partner/domestic violence, this memorandum will use masculine pronouns and nouns to refer to batterers and abusers.

Domestic violence also dramatically affects the lives of children and youth. Children in families where such violence occurs often remain invisible as victims. Research indicates that between 3.3 and 10 million children are exposed to or witness domestic violence annually, and “in a national survey of more than 6,000 American families, 50 percent of the men who frequently assaulted their wives also frequently abuse their children” (*Id.*). More than a decade of empirical studies demonstrate that exposure to and witnessing domestic violence (i.e., witnessing violence by batterers) can have significant negative effects on children’s behavioral, emotional, social, and cognitive development, including predisposing them to violent behaviors in adolescence and adulthood (Jaffe, 1995). Among older youth, approximately 20 percent of “female high school students report being physically and/or sexually abused by a dating partner...forty percent of girls age 14 to 17 report knowing someone their age who has been hit or beaten by a boyfriend” (Family Violence Prevention Fund, “Get the Facts,” Online).

Rape and stalking are crimes perpetrated frequently within the context of intimate partner relationships: “Three in four women (76 percent) who reported they had been raped and/or physically assaulted since age 18 said that a current or former husband, cohabiting partner, or date committed the assault ...and in 2001, 41,740 women were victims of rape/sexual assault committed by an intimate partner” (*Id.*). Every year, over one-half million women are stalked by an intimate partner; “seventy-eight percent of stalking victims are women...Women are significantly more likely than men (60 percent and 30 percent, respectively) to be stalked by intimate partners; ...[e]ighty percent of women who are stalked by former husbands are physically assaulted by that partner and 30 percent are sexually assaulted by that partner” (*Id.*).

The prevalence of domestic violence in custody cases where a GAL might be assigned is probably high. In a study on domestic violence policies and practices in court-based divorce mediation programs, the author found that “domestic violence is a common factor in divorce mediation cases. Some programs estimate that it occurs in almost 80 percent of cases; none of the programs put the incidence at less than 50 percent” (Pearson, 1997).

The depth and breadth of research documenting the prevalence and impact of domestic violence put the lie to “fabrication” myths that, against all reason, continue to be supported by laypersons as well as professionals in the arena of family law. Zorza (1998) addresses these myths that falsely cast doubts on battered women’s credibility:

One of the most pernicious myths, which is still widely repeated and believed, is that women frequently make false allegations of their own or a child’s abuse, and are particularly likely to do so for purposes of tactical gain in divorce or custody cases. In fact, women seldom make false allegations of either domestic violence (Harrell, 1993; APA, 1996, p. 12)...or child or sexual abuse (Thoennes, 1990, p. 161; APA, 1996, p. 12).

The Urban Institute documented that women filing for protection orders are abused an average of 13 times in the year before they seek judicial

relief, and that most women only come to court in desperation after everything else has failed to stop the abuse (Harrell, 1998, p. 54). ...

Similarly, child sexual abuse allegations are not common. Contrary to the myth that sexual abuse allegations are frequently made in divorce custody disputes, they are made in only 2-3% of divorce cases (Thoennes, 1990, p. 161; APA, 1996, p. 12) and in less than 10% of contested custody cases (APA, 1996, p. 12). Even then, when the allegations are objectively investigated, the allegations are confirmed as often when custody is being disputed as when there is no divorce or custody case (id.; McGraw, 1992, p. 58) (p. 67).

Zorza cites research supporting the contention that “batterers frequently minimize or deny their abuse or falsely blame their circumstances or others, especially their victims, for their behavior (citations omitted) (*Id.*, p. 67).

## 2. Indiana law and GAL training

In *Violence and the Family: Report of the American Psychological Association—Presidential Task Force on Violence and the Family*, the editors cite the inadequacy of most GALs’ knowledge about family violence or child development (1996, p. 102).<sup>7</sup> Dalton (1999) cites a preliminary study (Family Violence Project, 1995) reporting that “‘custody evaluators and guardians ad litem were the professionals least trained about domestic violence of any actors in the civil justice system’” (p. 285).<sup>8</sup>

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<sup>7</sup> See also, Appendix B, *GUARDING OUR CHILDREN: A Review of Massachusetts’ Guardian Ad Litem Program within the Probate and Family Court*, A Report of the Senate Committee on Post Audit and Oversight, March, 2001, <http://www.state.ma.us/legis/senate/guardchild.htm>; *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts*, Battered Womens’ Testimony Project at the Wellesley Centers for Women, <http://www.wcwonline.org/wrn/batteredreport.html>

<sup>8</sup>“ In the family court context, the consulting psychologists hired by parents or the guardians ad litem and custody evaluators assigned by the court play a pivotal role in protecting children’s interests. The same 1995 study that criticized lawyers for their handling of domestic violence in custody cases also reported that ‘custody evaluators and guardians ad litem were the professionals least trained about domestic violence of any actors in the civil justice system.’ The judges, attorneys, advocates, court administrators, court services personnel, and law professors interviewed for the study reported that evaluators and guardians ad litem were ‘heavily influenced by the social and legal policies that facilitate contact with the noncustodial parent without regard to the risks attendant upon contact or relationship.’ The interviewees also stated that the guardians ad litem were ‘not guided as much by law as by their training and predilections about appropriate post-separation custodial arrangements. Many appear[ed] to marginalize domestic violence as a factor with significant import for abused adults and children in custodial outcomes.’ [FN59] Similar concerns were expressed in a preliminary Massachusetts study conducted in 1998. Interviewed respondents, all lawyers or advocates working with battered women in the family court context, highlighted their feelings that guardians ad litem did not view domestic violence as serious, did not understand the risks associated with mediation and couples’ counseling in the face of abuse, did not appreciate that abusers can be skilled in manipulating the courts, allowed themselves to be manipulated by abusive partners, and tended to pathologize victims rather than understanding how they were affected by their experiences of abuse. The respondents also reported that many guardians ad litem lacked the clinical training needed to assess and respond to developmental and trauma issues among the children they interviewed. They noted



Indiana statutes defining “court appointed special advocates” and “guardian ad litem” state that court approved training is required for nonattorney CASAs and GALs but *not* for attorney GALs (IC 31-9-2-28; IC 31-9-2-50).<sup>9</sup> These statutes do not articulate criteria for a “court approved training program,” much less require specialized training involving domestic and family violence.

Indiana statutes confer extraordinary powers and responsibilities on GALs: they are “court officers” (IC 31-17-6-4), may subpoena witnesses and present evidence (IC 31-17-6-6)<sup>10</sup>, are authorized to provide the child with services, including “researching, examining, advocating, facilitating and monitoring the child’s situation” (IC 31-9-2-50), and can conduct investigations and submit reports concerning custodial arrangements (IC 31-17-2-12). In preparing custodial reports, GALs have extensive investigatory authority (IC 31-17-2-12)<sup>11</sup> and, in both theory and practice, have the power to strongly—if not profoundly—influence the custody decisions made by judges.<sup>12</sup>

***Because of these powers and responsibilities and because of the prevalence of domestic violence in custody cases, GALs must have training in the screening, identification and***

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that guardians ad litem were often inattentive to safety issues for mothers or children in their recommendations for visitation and custody” (Dalton, 1999, p. 285).

<http://www.thelizlibrary.org/liz/dalton.html>

<sup>9</sup> IC 31-9-2: <http://www.IN.gov/legislative/ic/code/title31/ar9/ch2.html>

<sup>10</sup> However, see F.G Hill (1998) for the proposition that “there is concern that this statute invites nonlawyer GALs and volunteer CASAs to participate in the unauthorized practice of law” (fn. 12).  
<http://www.law.indiana.edu/ilj/v73/no2/hill.html>

<sup>11</sup> IC 31-17-2-12 Investigation and report concerning custodial arrangements for child  
Sec. 12. ....

(b) In preparing a report concerning a child, the investigator may consult any person who may have information about the child and the child's potential custodian arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian. However, the child's consent must be obtained if the child is of sufficient age and capable of forming rational and independent judgments. If the requirements of subsection (c) are fulfilled, the investigator's report:

(1) may be received in evidence at the hearing; and  
(2) may not be excluded on the grounds that the report is hearsay or otherwise incompetent.

(c) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least ten (10) days before the hearing. The investigator shall make the following available to counsel and to any party not represented by counsel:

(1) The investigator's file of underlying data and reports.  
(2) Complete texts of diagnostic reports made to the investigator under subsection (b).  
(3) The names and addresses of all persons whom the investigator has consulted.

(d) Any party to the proceeding may call the investigator and any person whom the investigator has consulted for cross-examination. A party to the proceeding may not waive the party's right of cross-examination before the hearing.

<sup>12</sup> However, see *Vogt v. Vogt*, 455 N.W. 2d 471 (Minn., 1990), *reversible error to delegate judicial function to court staff*.

*dynamics of domestic violence, including issues involving batterer manipulation and victim and children's safety following separation.* Failure by a GAL to undertake appropriate training and to provide services informed by reliable research and best practices could compromise the safety of victims of domestic violence and expose the GAL to charges of neglect or malpractice.

### **3. The Model Code and GAL training**

Sections 510 and 511 of the Model Code require that judges, court personnel and state, county and city employees who work with domestic and family violence cases (including judicial officers, custody evaluators, and *court appointed special advocates*) receive continuing education in domestic and family violence. Courses required for continuing education credit include, but are not limited, to the following topics:

- (a) The nature, extent, and causes of domestic and family violence;
- (b) Practices designed to promote safety of the victim and other family and household members, including safety plans;
- (c) Resources available for victims and perpetrators of domestic or family violence;
- (d) Sensitivity to gender bias and cultural, racial, and sexual issues; and
- (e) The lethality of domestic and family violence (p. 47).

The Model Code was developed by the NCJFCJ “with the collegial and expert assistance of an advisory committee composed of leaders in the domestic violence field including judges, prosecutors, defense attorneys, matrimonial lawyers, battered women’s advocates, medical and health care lawyers, medical and health care professionals, law enforcement personnel, legislators, educators and others” (p.v). The Model Code, along with curricula and materials developed and published by the American Bar Association, the American Psychological Association, the NCJFCJ, the State Justice Institute, the Family Violence Prevention Fund, as well as other agencies, institutes, associations and state agencies and governments, represents exemplary or “best practices” which, in the absence of conflicting law, should guide those persons charged with making decisions about the best interests of children in custody cases involving domestic violence.<sup>13</sup>

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<sup>13</sup> For examples of best practices in GAL training, see Appendix B, *A Review of Massachusetts' Guardian Ad Litem Program within the Probate and Family Court*, A Report of the Senate Committee on Post Audit and Oversight, March, 2001, <http://www.state.ma.us/legis/senate/guardchild.htm>; American Bar Association Standards of Practice For Lawyers Representing a Child in Abuse and Neglect Cases: *The Court's Role In Lawyer Training* I-1. Judicial Involvement in Lawyer Training. <http://www.abanet.org/child/rep-train.html>; 2003 California Rules of Court, Rule 5.230. Domestic violence training standards for court-appointed child custody investigators and evaluators, <http://www.courtinfo.ca.gov/rules/titlefive/title5-1-285.htm>; Press Release from Mass. Probate and Family Court Department announcing mandatory domestic violence training for all guardians ad litem in child welfare cases --Supreme Judicial Court Rule 1:07 <http://www.state.ma.us/courts/courtsandjudges/courts/probateandfamilycourt/pr031703.html>

#### 4. Best practices in other states regarding GAL training

Minnesota is one of several states that has adopted comprehensive Rules of Guardian Ad Litem Procedure, which address minimum qualifications, application and screening processes, supervision, evaluation and complaints procedures, as well as general responsibilities, pre-service training and continuing education requirements.<sup>14</sup> Minnesota also requires training in the dynamics of abuse and violence, including the effects upon children of domestic violence and working with abusers, as part of pre-service training requirements.<sup>15</sup>

The Minnesota GAL Rules are especially notable for Rule 908.01, General Responsibilities of Guardians Ad Litem, which include, among many requirements, “respect and dignity” and “cultural competency” provisions<sup>16</sup>:

- (i) The guardian ad litem shall treat all individuals with dignity and respect while carrying out her or his responsibilities.
- (j) *The guardian ad litem shall be knowledgeable about and appreciative of the child’s religious background and racial or ethnic heritage, and sensitive to the issues of cultural and socio-economic diversity*, and in all cases governed by the Indian Child Welfare Act or the Minnesota Indian Family Heritage Preservation Act shall apply the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. (*emphasis supplied*)

Rule 908.02, Other Roles Distinguished, prohibits the GAL from serving as an appointed mediator and states: “A guardian ad litem may not be ordered to conduct a custody or visitation evaluation unless the court makes specific findings in the appointment order that there is no other person who is regularly responsible for the performance of, or who is available to conduct, custody visitation evaluations, and that the guardian ad litem has been properly trained to conduct those evaluations.”

The Minnesota Title X Rules also include Advisory Task Force Comments which address “Inappropriate Guardian Ad Litem Responsibilities”:

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<sup>14</sup> Title X. Rules Of Guardian Ad Litem Procedure  
<http://www.courts.state.mn.us/rules/general%5CGRtitleX.htm#g91201x>

<sup>15</sup> Excerpts from Minnesota GAL training manual, *Appendix, A Review of Massachusetts’ Guardian Ad Litem Program within the Probate and Family Court*, A Report of the Senate Committee on Post Audit and Oversight, March, 2001, <http://www.state.ma.us/legis/senate/guardchild.htm>

<sup>16</sup> For information regarding guidance to federal financial assistance recipients regarding Title VI prohibition against national origin discrimination affecting limited English proficient persons, see <http://www.hhs.gov/ocr/lep/revisedlep.html>

The provision of direct services to the child or the child's parents is generally beyond the scope of the guardian ad litem's responsibilities. Therefore, except in special circumstances, the appointing court should not order the guardian ad litem, and the guardian ad litem should not undertake, to provide such direct services. Providing such direct services could create a conflict of interest and/or cause a child or family to become dependent upon the guardian ad litem for services that should be provided by other agencies or organizations. The guardian ad litem may locate and recommend services for the child and family, but should not routinely deliver services. Specifically, a guardian ad litem should not: (a) provide "counseling" or "therapy" to a child or parent; (b) foster a friendship or "big brother/big sister" relationship with a child or parent by inviting the child or parent into the home of the guardian ad litem, routinely entertaining the child or parent at the movies, or giving money or gifts to the child or parent; (c) give legal advice or hire an attorney for the child or parent; (d) supervise visits between the child and parent or third parties, except as ordered by the court; (e) routinely provide transportation for the child or parent, except as ordered by the court; (f) provide child care services for the child; (g) make placement arrangements for the child or remove a child from the home; or (h) provide a "message service" for parents to communicate with each other.

**C. GALs must have the ability to: (1) evaluate mental health professionals, clergy, pastoral counselors, mediators and mediation programs, batterer and other intervention/education programs, as well as other "evaluators" whose recommendations might be relied upon in the GAL's investigation and report; and (2) make appropriate referrals.**

### **1. Evaluation of mental health professionals, mediators, and other "evaluators"**

The Model Code, as stated above, requires court-connected personnel and evaluators to be trained in relevant issues of domestic violence (Sections 505, 510). In *Domestic Violence and Children: Resolving Custody and Visitation Disputes—A National Judicial Curriculum* (1995) ("NJC"), the authors and editors devote an entire chapter to "Mediation, Evaluation, and Special Masters" (Ch.8, p. 121-140). This chapter focuses on the court's obligation (and by extrapolation, the GAL's where the GAL has been designated the task of evaluation) to scrutinize the domestic violence attitudes, background, training, and qualifications, of the following persons involved in custody cases where domestic violence is an issue: mental health professionals, mediators, expert witnesses, facilitators of batterer intervention programs, CASAs, GALs, clergy, pastoral counselors, and others engaged in making custody recommendations and decisions to the court (p. 121).

**a. *Mental health professionals***

Chapter 8 of the NJC reviews research demonstrating the often inadequate training of therapists and psychologists in the area of domestic violence and the omission of domestic violence in the professional literature addressing custody evaluations:

. . . (M)ost professional literature regarding custody assessments entirely omits the topic of violence, and literature that references abuse warns professionals to be cautious about exaggerated reports of violence by women. Many mental health professionals share the attitudes and believe the myths about domestic violence which prevail throughout society. ***Taken as a whole, these attitudes and lack of training result in mediators and evaluators who are unable to identify domestic violence cases, to mediate effectively in such cases, or to make appropriate recommendations.*** (emphasis added) (p. 122)

The court/GAL must be alert to research indicating that “professionals who do not have training are likely to reach uninformed, erroneous conclusions” particularly in assessing “the parenting abilities of battered women” using psychological test scores and courtroom behavior (*Id.* at p. 124). Saunders (1994, 1998) cites a study by Rosewater (1987) suggesting that the use of psychological tests (e.g., the Minnesota Multiphasic Personality Inventory) to evaluate battered women can lead to inaccurate diagnoses which mistake abuse-catalyzed traumatization for personality and psychotic disorders. Saunders (1998) elaborates:

To the extent that psychological disorders continue to be used to describe battered women, they can be placed at a serious disadvantage. Compared with the chronic problems of their partners, battered women’s psychological problems are much more likely to decrease as she becomes safer. Many battered women may seem very unstable, nervous, and angry (Crites & Coker, 1998). Other battered women may speak with a flat affect and appear indifferent to the violence they describe (Meier, 1993). These women probably suffer from the numbing symptoms of traumatic stress. The psychological test scores of some battered women may indicate severe personality disorders and mental illness. However, their behaviors and test scores must be interpreted in the context of the traumas they have faced or continue to face (Rosewater, 1987). The tactics used by their batterers parallel those used against prisoners of war and include threats of violence, forced isolation, degradation, and attempts to distort reality and increase psychological dependence. When women fear losing custody of children to an abusive partner, the stress can be overwhelming. (p. 4)

GALs must also be cautious in cases involving allegations of domestic violence where psychologists or therapists diagnose “parental alienation syndrome” (PAS). In its 1996 report, the APA Presidential Task Force on Violence and the Family states that,

“although there are no data to support the phenomenon called *parental alienation syndrome*, in which mothers are blamed for interfering with their children’s attachment to their father, the term is still used by some evaluators and courts to discount children’s fears in hostile and psychologically abusive situations” (p. 40).<sup>17</sup> Bruch (2001) contends that PAS “as developed and purveyed by Richard Gardner has neither a logical nor a scientific basis. It is rejected by responsible social scientists and lacks solid grounding in psychological theory or research” (p. 550). Zorza (1996) asserts that many mental health professionals continue to believe in discredited myths such as PAS and the “assumption that women in custody cases frequently falsely accuse their partner of child sexual abuse...” (p. 15). She argues that these erroneous conclusions by inadequately trained professionals compound “the misinformation and misconceptions that they and others in the court system have about battered women and domestic violence” and can place women and children at risk (*Id.*).<sup>18</sup>

IC 31-15-4-10, Joint Counseling, states: “The court may not require joint counseling of the parties under section 9 of this chapter: (1) without the consent of both parties; or (2) if there is evidence that the other party has demonstrated a pattern of domestic or family violence against a family or household member.” Although research indicates a *possible* adjunct role for conjoint and/or family therapy in cases involving domestic violence, there is significant controversy regarding such therapy, as well as specific guidelines whose adoption researchers encourage to assure victim/family safety (Leeder, 1994; Tolman & Edleson, 1995; Shama, 1996). Notwithstanding said research, Indiana law is clear that joint counseling cannot be required by the court (or by extrapolation, by the GAL) as a provisional order in an action for dissolution of marriage or for legal separation. IC 31-15-9-1, authorizing referrals for purposes of “conciliation,” must be read in the context of related statutes and the caveats to be exercised regarding the “appropriateness” of referrals where there are allegations of domestic violence

### ***b. Mediators and mediation programs***

In referring a custody case to mediation, IC 31-17-2.4-1 requires that the court determine “whether mediation is *appropriate* in helping the parties resolve their disputes (*emphasis added*).<sup>19</sup> Because “domestic violence is estimated to be a factor in at least one-half the cases served at court-based divorce mediation programs” (Pearson, 1997) and because

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<sup>17</sup> See also, *The validity of allegations of abuse raised in custody disputes*, *Scholarly Articles and Reviews* <http://www.leadershipcouncil.org/Research/PAS/pas.html#1>

<sup>18</sup> See Cervantes (1993) for the proposition that therapists have an ethical duty to assess for violence, “even when violence is not the presenting problem,” and to provide “treatment for cessation of violence” (p. 155).

<sup>19</sup> See IC 31-17-2.4-1 Factors in determination [mediation]: Sec. 1. Whenever the court issues an order under this article, other than an ex parte order, the court shall determine whether the proceeding should be referred to mediation. In making this determination, the court shall consider: (1) the ability of the parties to pay for the mediation services; and (2) *whether mediation is appropriate in helping the parties resolve their disputes (emphasis added)*. <http://www.IN.gov/legislative/ic/code/title31/ar17/ch2.4.html>

Indiana's family law statutes and ADR Rules are otherwise silent<sup>20</sup> on the use of mediation in custody cases involving domestic violence, GALs *must* look to best practices and Model Code for guidance in assessing: (1) whether referral of parties to mediation *is* appropriate; and (2) if appropriate, whether the mediator and/or program to which the parties are referred are competent; i.e., adequately trained to screen for and address proactively domestic violence issues, including safety issues.

The American Bar Association's Commission on Domestic Violence has published a Policy Report on mediation, the preface of which states: "**The American Bar Association recommends that court-mandated mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party.**" The policy report elaborates on the reasons why mediation "may be *inappropriate*, counter-productive and dangerous when one party has perpetrated domestic violence against the other":

First, domestic violence arises under circumstances where an imbalance of power is entrenched in the relationship. Second, perpetrators of domestic violence may use the legal system to further manipulate and abuse their victims. Third, mediation may endanger victims by placing them in a situation where they have to see their abusers in person and discuss issues that threaten the abuser's sense of control. Though this is relevant to all legal conflicts, it is presented with more frequency in family law cases in which the parties must resolve custody and visitation disputes.

In its conclusion, the policy report asserts that:

Mediation constitutes a court-sanctioned point of contact between abusers and victims. Court mediation programs can do much to increase the likelihood of a safe mediation process that ensures just and equitable outcomes. However, if not carefully structured with safety mechanisms in place mediation can provide abusers with ongoing opportunities for abuse. Safety considerations should be reflected within mediation statutes, court rules, procedures and professional practices. Mediators who intend to undertake these cases must be adequately trained about domestic violence. Ultimately, however, the most critical safety provision within any mediation process is the choice of a victim of domestic violence to opt-out of the process. That choice should be available before a victim enters mediation or anytime during the course of the process.<sup>21</sup>

The Model Code on Domestic and Family Violence states in section 407:

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<sup>20</sup> However, see IC 34-26-5-15, Prohibition on mediation. Sec.15: A court may not: (1) order parties into mediation; or (2) refer parties to mediation; for resolution of the issues in a petition for an order for protection regarding family or domestic violence. This section may not be construed to preclude mediation in other cases involving the same parties.

<sup>21</sup> American Bar Association Commission on Domestic Violence (2000)  
[http://www.abanet.org/domviol/med\\_reccomend.html](http://www.abanet.org/domviol/med_reccomend.html)



A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic or family violence has occurred unless:

- (a) Mediation is requested by the victim of the alleged domestic or family violence;
- (b) Mediation is provided in a specialized manner that protects the safety of the victim by a certified mediator who is trained in domestic and family violence; and
- (c) The victim is permitted to have in attendance at mediation, a supporting person of his or her choice including but not limited to an attorney or advocate.

The NJC recommends that training include “at a minimum: how to identify and screen for domestic violence; risk assessment and safety planning; whether to mediate where there is a power imbalance between the parties, and if so how to do this; effects of domestic violence on all family members; availability of local resources (e.g. batterer’s programs, advocacy and counseling for battered women, shelters, etc.); applicable state statutes and case law” (p. 124). The NJC also addresses issues of secure facilities, the need for separate sessions in mediation and counseling, problems with requiring battered parties to pay for evaluator fees,<sup>22</sup> and cultural sensitivity and linguistic accessibility (p. 127-128).

The ABA Center for Children and the Law and the Academy of Family Mediators have developed “Domestic Abuse and Custody Mediation Training for Mediators,” an 18-hour curriculum, and “Domestic Abuse and Custody Mediation Training for Judges and Administrators,” a three-hour version. Using the Model Code as a starting point, these curricula are premised on the concept that screening for domestic violence in custody and visitation cases should be mandatory, and when violence is found, mediation should not proceed unless the victim of violence requests it.<sup>23</sup>

### *c. Clergy and pastoral counselors*

In *Family Violence: Helping Survivors and Abusers-- A Manual for Faith Communities*, the author states:

Faith communities are in a unique place and time to respond to the horrible social crime of domestic violence. In a study done in a rural Minnesota county, 47.6% of respondents with abuse histories said, “I would rather rely on God to help me.” This suggests that clergy need to understand the dynamics of domestic violence and become aware of the advocacy programs available (Kershner M., Long D., Anderson J., unpublished data). When social services agencies in Santa Clara,

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<sup>22</sup> See IC 34-10-1-2 and *Sholes v Sholes*, 760 N.E. 2d 156 (Ind. 2001) for the argument that the court may not assess fees from indigent parties for court-ordered participation of evaluators and GALS.

<sup>23</sup> L Girdner, *Domestic Abuse and Custody Mediation Training for Judges and Administrators: Instructors Guide*, <http://www.abanet.org/media/jun99/domviol.html>



California asked domestic violence victims where they first turned for help, their answer, overwhelmingly, was to their church. But when the victims were asked where support was most lacking, their answer was the same: the church (National Catholic Reporter, 7-4-01).<sup>24</sup>  
(Jezierski, 2001)

Research has also shown “that, while clergy stated their training in counseling was lacking, 84% had counseled survivors of violence in the home in the course of their pastoral work (Weaver, 1995). In one study of 1,000 women who were survivors of family violence, one- third of them received help from clergy and one-tenth of the batterers were counseled by clergy (Weaver, 1995)” (*Id.* at p.37).

Rev. Marie M. Fortune, an ordained minister in the United Church of Christ and founder of the Center for the Prevention of Sexual and Domestic Violence, states that “[r]eligious concerns can become roadblocks or resources for those dealing with experiences of family violence because these concerns are central to many people’s lives. The outcome depends on how they are handled....The misinterpretation and misuse of [religious] traditions have often had a detrimental effect on families, particularly those dealing with family violence. Misinterpretation of the traditions can contribute substantially to the guilt, self-blame, and suffering which victims experience and to the rationalizations often used by those who abuse” (1991, p. 1).<sup>25</sup>

Because of the prevalence of domestic violence in the relationships of those seeking assistance from clergy and pastoral counselors, these professionals-- like mental health professionals and mediators—are obligated to provide competent services, which would include assessing for domestic violence and providing counseling and referrals consistent with the parties’ needs and the training of the provider. GALs should assess the training and competency of clergy and pastoral counselors to whom they refer parties or from whom they seek information and recommendations.

## **2. Evaluation of parenting and pre-divorce programs**

The NJC (1995) also recommends that courts identify the need for parenting education classes and pre-divorce seminars which screen for domestic violence, adapt programming for cases involving domestic violence (i.e., an “emphasis on cooperative parenting is rarely appropriate” (p.140) and incorporate protective measures in custody and visitation cases involving domestic violence. The NJC discourages court-compelled joint attendance of classes or attendance of classes where the promotion of “friendly parenting” supersedes safety issues involving the victim and children (*Id.*).

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<sup>24</sup> M. Jezierski, (2001). Creating a safe place: Encourage to change--Family peacemaking materials for clergy, lay leaders, staff & laity. Anoka County Faith Community Peace Initiative, 2000; Anoka County, Minnesota <http://www.mincava.umn.edu/documents/clergybook/clergybook2.doc>

<sup>25</sup> See FaithTrust Institute for programs, resources and training for diverse faith communities and clergy. <http://www.cpsdv.org/Domestic-Violence/index.htm>

### 3. Evaluation of batterer intervention programs

Central to the GAL's recommendations and report is an assessment of any batterer intervention program (BIP), including an assessment of the facilitators and/or therapists involved in making evaluations of the batterer. In cases involving allegations of domestic violence and referral to a BIP, the GAL must rely on best practices or standards in conducting this assessment.

In January, 2002, after several years of extensive research and deliberation, the Indiana Coalition Against Domestic Violence approved "Standards For Batterers Intervention Programs."<sup>26</sup> In the introduction to the standards, ICADV states: "The intent of these Standards is to insure overall quality and consistency for service providers. A Batterers Intervention Program (BIP) is a community program that makes victim safety its first priority, establishes accountability for batterers and promotes a coordinated community response to domestic violence." The standards provide specific guidance to providers, advocates and clients in the following areas: principles of practice; definition of domestic violence; confidentiality; standards for BIP facilitators; educational and training requirements; service standards and content; monitoring; partner contact; and ethics

"Evaluation of Treatment Programs for Batterers," a paper written by John M. Beams (an attorney and batterer treatment program facilitator in Fort Wayne, Indiana) and prepared for the Indiana Regional Workshops for Judges and Prosecutors in January, 1997, reviews the literature on treatment outcomes and BIPS as well as the draft standards for effective programs that preceded the 2002 standards approved by ICADV.

Beams refers to a comprehensive review of BIPS by Holtzworth-Munroe et al (1995), which suggests that "completion of a program will, to a very modest degree, predict a reduction in violence" (p.2). However, the authors cite Rosenfeld (1992) who " ' . . . concludes that men who complete treatment have only slightly, and often nonsignificantly, lower recidivism rates than men who refuse treatment, drop out of treatment, or remain untreated, and only 'modest gains' in reduction of psychological abuse'" (*Id.*).

A study by Gondolf (1998) of four programs of differing duration, but all approximating "the gender-based cognitive behavior approach endorsed by most states that have standards for batterer programs," suggests that the programs all decreased recidivism significantly for participants compared to nonparticipants in the 15-month follow-up. However, the reassault rate for the participants was still 32% to 39%. Of note in the follow-up period is that "fully 70% of the men were verbally abusive, nearly half (45%) used controlling behaviors, 43% threatened their partners and 16% stalked them" (p.78). Recent reviews of BIPs contend that they have a small but significant effect (Bennett & Williams, 2001; Gondolf, 2003); have no benefit at all (Zorza, 2003; Feder et al, 2003);

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<sup>26</sup> Indiana Coalition Against Domestic Violence. (2002). *Standards for batterers intervention programs*, <http://www.violenceresource.org/bipstand.htm>

or that additional research needs to be conducted to assess effectiveness (NIJ, 2003; Feder et al, 2003).<sup>27</sup>

Beams warns against “anger management” programs where the exclusive focus is on anger control rather than recognizing that violence is used by men to control women (Gondolf & Russell, 1986). Andrew Klein, former Chief Probation Officer, Quincy Court, Quincy, MA., states that the “chief criticism of anger-control programs is that they too suggest that the batterer’s temper is provoked by the victim,” citing Gondolf & Russell; he goes on to say that “both couple counseling and anger-control programs diffuse the responsibility of the abuse and prolong the offender’s denial. They also let the community off the hook by ignoring the role social attitudes play in condoning abuse and violence towards women in general” (“Spousal/Partner Assault: A Protocol for Sentencing and Supervision of Offenders,” Appendix One to the Model Code on Domestic and Family Violence) .

Sec. 508 of the Model Code (“Regulation of programs of intervention for perpetrators, required provision, duties of providers”) articulates standards for BIPs similar to the ICADV standards. These standards also include a primary focus on, among other issues, stopping the acts of violence and ensuring the safety of the victim and the children, holding the batterer accountable for his behavior, recognizing that substance abuse is a problem separate from domestic or family violence which requires specialized treatment, and allowing the provider to provide information to the victim and victim’s advocates regarding the status of the batterer during and after treatment.

No BIP is able to guarantee that a participant who has completed the program will not reassault the victim or is, after completion, a better parent, particularly in a program of short duration that is not likely to have a component on parenting or on the impact of domestic violence on children. Indeed, in light of the above research involving nonphysical abuse, the batterer is more likely than not to model “corruptive” behaviors, *post-treatment*, that demonstrate to children that power and control can still be exercised in coercive, threatening and frightening ways that exclude physical abuse (e.g. “intimidation through mean looks or smashing things; financial control by taking money or giving little cash to one’s partner; coercion and threats by making a woman do illegal things or reporting her to welfare agencies; emotional abuse in the form of threats, put downs and mind games; isolation through controlling what a woman does; using male privilege by making all the decisions and treating a woman like a servant,” (Gondolf, 1998, p.140).

In evaluating BIPs, the GAL must take into consideration the caveats above, as well the research controversies regarding the effectiveness of *any* program, particularly since “referral of a batterer to a BIP is one of the strongest predictors that a woman will leave shelter and return to the batterer” (Bennett & Williams, 2001, p. 15). The only BIP in the

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<sup>27</sup> National Institute of Justice. (2003). *Batterer intervention programs: Where do we go from here?* <http://www.ncjrs.org/pdffiles1/nij/195079.pdf>.

Monroe County area that meets the standards articulated by ICADV and the Model Code is the program at the Center for Behavioral Health which involves a 22-week commitment by the batterer. The court/GAL must review carefully and with skepticism any batterer intervention program not meeting these standards and, by necessity, the status of the batterer who has completed this program.

#### **4. Evaluation of gender bias in evaluators, programming and recommendations**

The GAL should consider bias in the process of decision-making regarding the “best interests” of the child in light of “(r)eports from supreme court task forces on gender bias in the courts (documenting) that domestic violence is an area in which women experience significant bias” (Schafran, 1996, p. 8-12). Gender bias can range from courts and court personnel/officers “urging the parties to work it out when domestic violence is alleged” to “trivializing comments or ignorance of the dynamics of abuse” (*Id.*). Gender bias might also be evident in an unreasonable application of differing requirements for the abuser and the victim with regard to counseling, treatment, parenting programs, housing and dictation of lifestyle. The author of this chapter recommends that attorneys representing victims of suspected gender bias (e.g. where the judge attempts to silence the attorney or victim who raises the batterer’s history of abuse “to prevent release on bail” or plausibly, as a primary “best interest” factor) make a record of objections to such bias for purposes of appeal or complaint to a disciplinary committee. The author cites California law for the proposition that “gender bias itself is also grounds for an appeal” (*Id.*).

#### **5. Referrals to domestic violence programs and provision of safety planning**

In addition to making appropriate referrals to competently-trained professionals, the GAL must be prepared to refer victims of domestic violence and their children to domestic violence programs and social service agencies and other resources<sup>28</sup> and to provide appropriate safety planning<sup>29</sup>

**D. Failure by the GAL to screen for domestic violence and make custody/visitation recommendations according to statutory mandates, relevant professional literature, and “best practices” standards may subject the GAL to claims or complaints of negligence, gross misconduct, malpractice or ethical violations.**

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<sup>28</sup> For information regarding national domestic violence programs, see National Coalition Against Domestic Violence, <http://www.ncadv.org/>; The National Domestic Violence Hotline: 1-800-799-7233. For information regarding Indiana domestic violence programs, see Indiana Coalition Against Domestic Violence, <http://www.violenceresource.org/inprog.htm>; ICADV Hotline 1-800-332-7385 Voice and TTY. For information regarding a domestic violence program in Bloomington, Indiana, see Middle Way House Domestic Violence and Rape Crisis Center, <http://www.bloomington.in.us/~mwhouse/>; 812-336-0846.

<sup>29</sup> Personalized Safety Plan, Barbara Hart and Jane Stuehling, PCADV, 524 McKnight Street, Reading, PA 19601; <http://www.mincava.umn.edu/documents/hart/hart.html#id2644407>

Although Indiana GAL statutes do not articulate a standard of care other than “good faith,” the prevalence of domestic violence in divorce cases involving custody disputes (50 to 80%: Hart, NCJFCJ teleconference, 1995; Pearson, 1997) and the significant overlap of spouse abuse and child abuse (30 to 70%: Bowker et al, 1988; Stark & Flitcraft, 1988; Straus & Gelles, 1990) may very well impute to the “good faith” standard, and thus to GALs, a working knowledge of domestic violence issues and the ability to assess, intervene and refer appropriately, particularly when safety is an issue. Failure to exercise these responsibilities *may* constitute negligence or “gross misconduct” where such failure results in psychological, emotional or physical harm, thus overriding the limited immunity a GAL enjoys (IC 31-17-6-8).

In addition to the foregoing obligations, attorney GALs (or, GALs who *are* attorneys) may be subject to the Professional Rules of Conduct. Model and Indiana Rule 1.1 mandate that attorneys “provide competent representation to a client” which “requires the legal knowledge, skills, thoroughness and preparation necessary for the representation.” Susan Swihart, Esq. opines in the ABA’s *The Impact of Domestic Violence on Your Practice—A Lawyer’s Handbook* that a lawyer’s failure to address domestic violence issues constitutes incompetent representation (Goelman et al, 1996, p. 12-1). Buel (1998) contends that a failure to screen for domestic violence and to undertake the requisite legal steps to represent clients adequately is malpractice (p. 2); she also states that “cultural competence must be required, with on-going training and guidance for all” (p. 4).

Competent representation would clearly include knowledge of the dynamics of domestic violence, familiarity with applicable state and federal statutes and case law, and, where a GAL is an attorney, use of “relevant portions of social science literature on domestic violence...” in memoranda of law (Goelman et al, 1996, p. 5-4). Where children have been exposed to interparental violence, the GAL should assess whether “the well-being of children is compromised by ongoing conflict, exposure to violence and parental role-modeling that is coercive and threatening. . .and provide the court with testimony about restrictions on custodial access designed to minimize the psychological and physical trauma to children and the abused parent” (*Id.*).

## **1. GAL complaint procedures**

Neither Indiana law nor court rules provide a mechanism for filing a complaint against a GAL (other than a civil tort complaint for “gross misconduct”). Although it does not have the authority to sanction attorney (professional) GAL or CASA conduct, the Office of Guardian Ad Litem and Court Appointed Special Advocate Services in the Division of State Court Administration does accept letters of complaints informally.<sup>30</sup> Individuals who believe that a “professional” GAL (e.g., lawyers, mental health professionals and other evaluators whose conduct is governed by professional codes of conduct) has engaged in behavior that is unethical, irresponsible or unprofessional can arguably file a

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<sup>30</sup> Office of Guardian Ad Litem and Court Appointed Special Advocate Services, Division of State Court Administration, phone: 800.542.0813; Leslie Rogers, J.D., Director; email: [lr Rogers@courts.state.in.us](mailto:lr Rogers@courts.state.in.us); <http://www.in.gov/judiciary/galcasa/about.html>

complaint with the court with jurisdiction over the case, the official agency that licenses the professional, or with the professional association that has developed ethical codes or rules for the profession.<sup>31</sup>

**II. A history of domestic violence, irrespective of separation and divorce, is always relevant to custody/visitation decision, constitutes child abuse by the batterer, and should raise a rebuttable presumption that it is not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the batterer or abuser.**

**A. Spouse abuse constitutes child abuse by the batterer, even where the father has not physically or sexually abused the child or children, and renders the father an unfit candidate for sole custody, joint legal custody, or joint physical custody.**

Dr. Peter Jaffe has worked in the area of family law, domestic violence, and the impact of domestic violence on children for over twenty years. He is the author of 80 articles addressing these issues and a principal author of several books, including *Children of Battered Women* (1990). The author consulted with Dr. Jaffe regarding an international custody case in federal district court. Dr. Jaffe was particularly helpful in outlining the salient issues in cases where judges face this question: Can a father-- who has engaged in acts of domestic violence (but no documented child abuse *per se*) against his children's mother where the children are present in the home and/or are witnesses to the domestic violence--be considered an appropriate or fit parent for sole or joint custody?

Dr. Jaffe's response to this question is a resounding "no." In a 1995 NCJFCJ videotape, Dr. Jaffe asserts that an abusive parent, irrespective of his personal, nonviolent relationship with a child, cannot be considered a "nurturing parent." Jaffe, along with other experts, including Somer & Braunstein (1999) and Crites & Coker (1988), maintains that spouse or partner abuse can be as psychologically traumatizing to child witnesses as actual child abuse, i.e., that child-witnessed spouse abuse constitutes child abuse or psychological maltreatment *per se*.<sup>32</sup>

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<sup>31</sup> For an example of state court GAL complaint procedures, see Guardian ad Litem Grievance Procedures, Superior Court, Whatcom County, WA [http://www.co.whatcom.wa.us/superior/local\\_rules/gal-grievance-procedures.htm](http://www.co.whatcom.wa.us/superior/local_rules/gal-grievance-procedures.htm) and Title X. Rules Of Guardian Ad Litem Procedure, Rule 907.01 Complaint Procedure <http://www.courts.state.mn.us/rules/general%5CGRtitleX.htm#g91201x> ; also, see Sample Complaint, <http://www.wcwonline.org/wrn/sample.pdf> and Filing Professional Complaints in Massachusetts, <http://www.wcwonline.org/wrn/complaints.pdf>, Wellesley Centers for Women. NOTE: This last document issues this caveat: "However, you should consider before making the complaint whether the person may be in a position to retaliate against you for doing so. Also you should be aware that the great majority of complaints are not acted upon. Filing complaints can be valuable even if no action is taken, however, because they increase the pressure on the oversight boards to eventually take seriously the systemic mistreatment of battered mothers in custody and visitation litigation."

<sup>32</sup> Children's Exposure, Minnesota Center Against Violence and Abuse <http://www.mincava.umn.edu/cgi-bin/documents/documents.pl?category=757&detail=1>; Domestic Violence and Children, *The Future of Children*, Volume 9, Number 3 - Winter 1999 [http://www.futureofchildren.org/pubs-info2825/pubs-info.htm?doc\\_id=70473](http://www.futureofchildren.org/pubs-info2825/pubs-info.htm?doc_id=70473)



The effects of witnessing spouse/partner abuse are widely documented in the literature, and include psychosomatic, psychological and behavior dysfunction. Buhl (1998) states in her article that a "Massachusetts' Department of Youth Services found that children growing up in violent homes had a six times higher likelihood of attempting suicide, a twenty-four percent greater chance of committing sexual assault crimes, a seventy-four percent increased incidence of committing crimes against the person, and a fifty percent higher chance of abusing drugs and/or alcohol" (p.6)

Jaffe (1995) asserts that "approximately 1 in 3 boys who witness violence will have problems so severe that they would qualify for a significant mental health intervention" and that "boys' symptoms are usually in the externalizing category that include destruction of property, disobedience in school, fighting, and attacking people" (p. 21). In the tape, he states that boys living in violent households have 17 times the rate of emotional problems as boys not exposed to marital violence. The more "subtle effects" caused by such exposure include: the inculcation in boys of distorted attitudes and the use of violence to exert power and control in interpersonal relations, particularly with girls and women; the legitimizing of violence as an appropriate form of "conflict resolution" and a means to gain respect or control in a relationship; and the justification of violence as excusable where the abuser is drinking or a victim has done something to "provoke" him (p. 22).

Importantly, "men who batter their partner are likely to also abuse their children. One study estimated a *seventy percent* coincidence of partner and child abuse in violent families. In New York, it was reported that half of the children whose mothers are abused are likely to be victims of physical abuse. In most cases, the abuse of the children ends when the children are removed from the batterer's environment and placed exclusively with their mother. Additionally, the more serious the battery of the mother, the more severe the child maltreatment" (Buel, 1996, p. 6).

Unborn and young children are especially vulnerable to wife-battering. A study by the March of Dimes (1993) found that when pregnant women are battered, their babies need extended medical attention upon birth and are 40 times more likely to die during their first year of life. Researchers have found the prevalence of abuse in a given pregnancy ranging from 3.8% to 29% (National Battered Women's Law Project, 1996).

Somer et al (1999) review the research on childhood witnessing of interparental violence and cite a litany of severe developmental damages, including: "depression, anxiety, cognitive problems, delinquency and proneness to violence and victimization" (p. 449). *They unequivocally assert that parental failure on the part of the abusing parent "to shield children from such traumatizing experiences constitutes child maltreatment in that it exposes the victims to (a) terrorizing, and (b) missocializing by corrupting models. Psychological maltreatment is even more potentially damaging than direct physical abuse or neglect alone" (Id.).* Jaffe, in the videotape, affirms this conclusion by reiterating that a spouse-abusing father is not a candidate for sole or joint custody for the reason that his modeling of violent behaviors and his promotion of a terrorizing

emotional environment within the home so clearly pose severe adverse consequences for children.

**B. Separation of the parents usually does not mitigate the harmful effects of spouse abuse, alter the batterer's lifelong pattern of using violence or nonphysical abuse tactics to control others, nor negate the GAL's duty to assess the abuser's fitness for custody according to the standards promulgated in Section I.**

**1. Separation is generally a time of increased risk to the safety of the battered spouse and her children**

Although separation of parents where there has been spousal abuse may decrease the incidence of violence, the literature indicates that separation is more likely a time of increased danger to both mother and children as the father attempts to reclaim the family or retaliate (Bowker et al, 1988). In one study, separated or divorced women were 14 times more likely to report domestic violence victimization than were married women; while separated or divorced women comprised 10% of the women in the sample, they reported 75% of the domestic violence (Harlow, 1991). As many as 73% of calls made to police regarding domestic violence occur after separation (U.S. Dept. of Justice, 1983). Moreover, as much as 90% of the hostage-taking in this country involves attempts to coerce a partner to return or remain in the marriage or relationship. 100% of these hostage-takers are men (FBI, 1989). Lastly, during separation, women are five times more likely to be killed by their husbands than prior to separation or after divorce. (Crawford & Gartner, 1992).

**2. Separation, pre- and post-divorce periods, and legal proceedings are often a time of increased attempts by the batterer to retaliate and to manipulate the battered spouse, the children, the court system, attorneys and service providers, including custody evaluators.<sup>33</sup>**

Zorza (1998) cites numerous studies on batterers demonstrating that “men who abuse women minimize or deny their abuse or falsely blame their circumstance or others, especially their victims” (p. 67). Zorza claims that “batterers are adept at manipulating mental health professionals” in part because “few therapists and custody evaluators have any (or sufficient) training in or understanding of domestic violence” (*Id.* at p. 68).

Batterers frequently “manipulate and use the court system to further control and discredit their victims”; batterers “‘manipulate family members, police, and social service providers to be against the battered woman and counter her story’ whenever they feel threatened. A victim filing for divorce, custody, child support, or civil protection can be

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<sup>33</sup> See footnote 3, p.4, *Are ‘Good Enough’ Parents Losing Custody to Abusive Ex-Partners?*  
<http://www.leadershipcouncil.org/Research/PAS/PAS1/DV/dv.html>



just as vulnerable to retaliation” (*Id.*). Additionally, batterers may retaliate by reporting the abused spouse to welfare or “file retaliatory litigation against their victims to drive them into homelessness or welfare; half of America’s homeless women and children are homeless because of domestic violence” (Zorza, 1991, p. 421).

Additionally, batterers will often use the children, post-separation, “as leverage to coerce the victim to return, whether promising gifts for them or invoking guilt for deriving them of a father figure. Children report being routinely grilled by the batterer regarding their mother’s actions, dress, social life and spending habits, in flagrant disregard for the emotional toll exacted” (Buel, 1998, p. 6).

Jaffe (1996) points out that “if separation proceeds safely, then children find themselves the focus of a custody and visitation dispute. The abusive parent discovers that now the most effective way to hurt or destroy the other parent is through emotional and psychological abuse. His violence is denied and the mother’s mental health, alcohol or drug abuse, and fitness as a parent gets placed under a legal microscope. The conduct of battered women relating to coping with violence is held against them or even misinterpreted by traditional assessment techniques. . . . Paradoxically, women may not be believed when violence is reported because they are seen as exaggerating incidents of violence as a way of manipulating the court. Men’s violence may be minimized as only an emotional reaction to the separation” (p. 24, 25). Jaffe concludes that, in his experience of over 20 years of completing custody and visitation assessments, ***“the real problems lie in overlooking violence and most women under-reporting out of embarrassment, humiliation, and lack of trust for legal and mental health professionals”*** (*Id.* at p. 24, *emphasis added*).

### **3. Separation of the victim from the batterer does not “cure” the batterer of lifelong “learned” behaviors that include the use of violent and nonphysical abuse tactics to control his (and other) victim(s) and his children.**

The use of physical and nonphysical abuse tactics by a batterer is *learned behavior*, independent of any characteristics of his victim. This behavior is learned over a period of years (or a lifetime) and reinforced through the following: observation; experience and repeated reinforcement; familial and parental modeling; and community, cultural and institutional ignorance and tolerance (school, peer groups, churches, media, entertainment, law enforcement, judiciary, mental health services, etc). Domestic violence is *not* caused by genetics, illness, anger, alcohol & drugs, *behavior of the victim*, or problems in the relationship and may likely be directed at some point toward another victim if the abuser loses control of his current victim (Ganley & Schecter, 1996).

Domestic violence is repeated because it works. It gets overtly, covertly, and inadvertently reinforced by all of society’s institution (see Dutton, G., 1988; Ganley, A., 1989). The pattern of domestic violence. . . allows the perpetrator to gain control of the victim through fear and intimidation. (Ganley, 1995)

Although, theoretically, learned behavior can be “unlearned,” research cited earlier in this report on the effectiveness of batterer treatment programs delineates the limitations of the most comprehensive treatment program. Thus, any visitation or custody recommendations made during the separation or post-separation period should reflect the known realities evinced by research in the social science literature and “best practices” standards developed by experts in the area of domestic violence and family law.

**C. A history of domestic violence is always relevant to custody and visitation decisions and should raise a rebuttable presumption that it is not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the batterer or abuser.**

**1. A review of Indiana law, the Model Code, best practices standards, and relevant social science literature should raise a rebuttable presumption that, in the absence of compelling evidence or research to the contrary, it is not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the batterer or abuser.**

Indiana law governing custody, visitation and joint custody should preclude the batterer from being considered a fit parent for anything other than noncustodial status. IC 31-17-2-8 (7) mandating consideration of domestic violence as a “best interest” factor-- in combination with IC 31-17-2-15, which discourages joint custody where the parties are not “willing and able to communicate and cooperate in advancing the child’s welfare”-- emphasizes the preference in awarding sole legal and physical custody to the nonviolent parent who has shown an equal or greater ability to provide for the child according to the other statutory factors.

Such an award would: (1) limit unnecessary contact between victim and a batterer who is likely to use such contact to harass and undermine his ex-spouse (Jaffe, 1996); (2) provide greater financial stability to the victim and children at a time when a batterer may be focused, irrespective of his children’s needs, on destabilizing his victim through any means possible, including limiting her access to financial resources; and (3) provide substantive opportunities for the victim and children to experience independence and self-reliance and to develop positive strategies for conflict management and problem solving.

Sec. 401 of the Model Code, Presumptions concerning custody, states:

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.

In the commentary to Sec. 401, the Commentary reiterates the language of this report:

Support for the presumptions incorporated in this section. . . is extensive. This section compels courts, attorneys, custody evaluators, and other professionals working with cases involving the custody of children to consider the impact of domestic and family violence on these children. This mandate is not limited to courts issuing orders for protection by includes court hearing divorce, delinquency and child protection cases.

Buel (1998) reports that “(j)ust such a presumption was unanimously passed by Congress in 1990, in response to the realization that too many batterers were able to present well in court and obtain custody of the children” (1998, citing H. Con. Res. 172, 101 1<sup>st</sup> Cong., passed 9-27-90, passed unanimously 10-25-90) . She also applauds Louisiana’s 1992 amendment to its custody code (similar to the submission of Indiana legislation in 1998) which “includes the above-referenced presumption against custody to the batterer, but also specifies that the abusing parent can only obtain supervised visitation and must successfully compete a batterer’s intervention program” (*Id.*).

### **III. Recommendations for custody and visitation**

#### **A. Assessment of the parents**

Crites and Coker (1988), who believe that the judge’s primary task is “to determine which parent is most likely to provide the child with a healthy, caring, *nonviolent* home,” give an excellent overview of assessment of the individual parents in making decisions regarding custody and visitation awards<sup>34</sup>. Assuming that a batterer is presumptively unfit to have joint or sole custody, their guidelines are useful in determining appropriate visitation plans based on the batterer’s “progress is in the following areas”:

1. acceptance of his responsibility for the abuse.
2. understanding of his use of psychological and sexual abuse as well as physical abuse to maintain control of this partner.
3. level of emotional dependency on the part of the abuser.
4. ability to recognize low levels of anger and to use anger management techniques such as “time out” and “cool down” techniques.
5. empathy for the victim (p. 12)

In assessing victims, the authors suggest assessment of the following areas relating to her ability to provide an emotionally healthy environment for the children:

1. self-esteem level
2. ability to develop independent goals
3. ability to free self from feelings of guilt
4. use of community support network

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<sup>34</sup> See also Guidelines for Child Custody Evaluations in Divorce Proceeding. (1994). *American Psychologist* 49, 7, 677-680. <http://www.apa.org/practice/childcustody.html>

5. ability to disengage from abusive partner
6. ability to ask for what she wants
7. ability to recognize own strengths (p. 13, 40)

### **B. Award and enforcement of support orders**

Buel (1998) asserts that domestic violence victims' ability to provide a safe and stable environment for their children is dependent, in large part, on their ability to obtain child support (p. 9). She describes how batterers often use nonpayment of child support as a means of harassing the victim and forcing her to return: "Pennsylvania found that the most common factor among those men who did not pay child support was their shared propensity for committing violence crimes. Thus, the 'get tough' approach to child support enforcement is particularly necessary with batterers because they threaten and frighten their victims" (*Id.*).

### **C. Assessment of the severity of marital conflict**

Assessment of the severity of marital conflict is a prerequisite to determining custody and visitation issues. Garrity & Baris (1995) state that "the principle that children's interests are best served when the children continue to feel loved by and to have frequent access to and contact with both parents" is superseded by "research data showing that children do not thrive in the middle of severe, ongoing conflict or when it exposes them to endangerment or the threat of harm" (p. 40). The authors state that "(i)t is essential to balance children's needs for protection from psychological and physical harm with their need to maintain a positive, supportive relationship with both parents. . . The courts, attorneys and mental health professionals must work together to create plans tailored to child's needs. *For these (high risk) families, the well-being of the children must be the primary consideration over and above the parent's right to visitation*" (*Id.*, *emphasis added*).

For help in understanding the "behaviors, characteristics, and features of different levels of conflict," Garrity and Baris refer readers to their Conflict Assessment Scale which describes a continuum of conflict severity from "minimal" (1) to "severe" (5). Conflict which involves "endangerment by physical or sexual abuse" is listed as "severe;" conflict where the child is experiencing "emotional endangerment" is listed as "moderately severe" (p. 42). The authors briefly, but succinctly, describe the effects on children of their attempts to cope with severe and moderately severe conflict, describing an array of behavioral and psychological problems.

In planning for custody and visitation in moderately severe and severe families, the authors recommend that the endangering parent be evaluated for: "(1) ability to maintain impulse control; (2) capacity to empathize with the child; (3) ability to change problem-solving style; and (4) capacity to create and maintain a safe environment" (p. 43). They suggest that "parents who are physically or sexually abusive often lack a basic capacity to empathize with their children and are therefore at high risk to continue that pattern of behavior" (*Id.*, citing, Finkelhor, 1986). Garrity and Baris offer specific visitation

guidelines within the context of severity of conflict, children's ages, and prognosis for parental remediation (pp. 44-45).

#### **D. Jaffe's "Considerations for Judges"**

Jaffe (1995) lists in the NCJFCJ videotape four considerations for judges making custody, visitation and access decisions:

##### **1. Frightened mothers can't be friendly parents; judges should not "promote" friendly visitation with a victim's abuser.**

He describes how courts often hold against mothers their "unfriendly" relationship with their abuser or "unfriendly" appearance in court. He remarks that victims' reactions to their abusers are reactions anyone would have if they were asked to promote visitation with a "terrorist". He believes judges should not promote access to these "domestic terrorists," abusers who go to extraordinary lengths to exert power and control over their spouse and children.

##### **2. History of violence is often not known to community professionals**

Jaffe underscores the essential task of the court and the GAL in assessing families for domestic violence. This topic has been dealt with at length elsewhere in this letter.

##### **3. Husbands who abuse and terrorize cannot be considered nurturing parents.**

Earlier in this report, Jaffe is quoted extensively with regard to his research and decades of clinical experience to the effect that an abusive father cannot be considered fit for custodial purposes.

##### **4. Judges should focus on safety rather on "just forgetting past hostilities"**

Jaffe asserts that it is counterintuitive and dangerous to ask a victim to "just forget past hostilities." A prior history of criminal or abusive behavior is often the best predictor of future violence. He encourages courts to focus on safety concerns and understand that a past history of domestic violence is always relevant to issues of custody, visitation and access.

#### **E. Conditions of Visitation**

##### **1. The National Judicial Curriculum**

The NJC devotes two chapters to visitation issues in cases where domestic violence is involved. Considerations suggested for the court include:

- a. Is the perpetrator likely to kill or commit life-endangering violence (see lethality checklist)?

- b. Should the court order an evaluation by a domestic violence expert regarding the effect on the children of contact with the perpetrator?
- c. Should the court order the perpetrator to satisfy certain conditions before permitting visitation (e.g. completion of batterer's counseling, alcohol or drug counseling parenting counseling)?
- d. Are there criminal charges pending against the perpetrator? . . .[or in the alternative, is the perpetrator on probation?]
- e. Can the order be crafted in a manner that promotes the safety and well-being of the children and the abused party?
- f. Does the order ensure that contact between the parties is conducted in a manner such that the abused party feels and is safe?
- g. Does the order contain specific language that will enable law enforcement to properly enforce it?

In the appendices, the NCJ offers both a checklist for visitation and examples of specifically worded visitation orders.

## **2. The Model Code**

Sec. 405 of the Model Code, Conditions of visitation in cases involving domestic and family violence, states:

- 1. A court may award visitation by a parent who committed domestic violence or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.
- 2. In a visitation order, a court may:
  - (a) Order an exchange of a child to occur in a protected setting.
  - (b) Order visitation supervised by another person or agency.
  - (c) Order the perpetrator of domestic or family violence to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators or other designated counseling as a condition of the visitation.
  - (d) Order the perpetrator of domestic or family violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding the visitation.
  - (e) Order the perpetrator of domestic or family violence to pay a fee to defray the costs of supervised visitation.
  - (f) Prohibit overnight visitation.
  - (g) Require a bond from the perpetrator of domestic or family violence for the return and safety of the child.
  - (h) Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of domestic violence, or other family or household member.
- 3. Whether or not visitation is allowed, the court may order the address of the child and the victim to be kept confidential

4. The court may refer but shall not order an adult who is a victim of domestic or family violence to attend counseling relating to the victim's status or behavior as a victim individually or with the perpetrator of domestic or family violence as a condition of receiving custody of a child or as a condition of visitation.
5. If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.

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## APPENDIX A

### Family Violence Prevention Fund: Get the Facts

<http://endabuse.org/resources/facts/>

#### Domestic Violence is a Serious, Widespread Social Problem in America: The Facts

##### Prevalence of Domestic Violence

- Estimates range from 960,000 incidents of violence against a current or former spouse, boyfriend, or girlfriend per year<sup>1</sup> to three million women who are physically abused by their husband or boyfriend per year.<sup>2</sup>
- Around the world, at least one in every three women has been beaten, coerced into sex or otherwise abused during her lifetime.<sup>3</sup>
- Nearly one-third of American women (31 percent) report being physically or sexually abused by a husband or boyfriend at some point in their lives, according to a 1998 Commonwealth Fund survey.<sup>4</sup>
- Nearly 25 percent of American women report being raped and/or physically assaulted by a current or former spouse, cohabiting partner, or date at some time in their lifetime, according to the National Violence Against Women Survey, conducted from November 1995 to May 1996.<sup>5</sup>
- Thirty percent of Americans say they know a woman who has been physically abused by her husband or boyfriend in the past year.<sup>6</sup>
- In the year 2001, more than half a million American women (588,490 women) were victims of nonfatal violence committed by an intimate partner.<sup>7</sup>
- Intimate partner violence is primarily a crime against women. In 2001, women accounted for 85 percent of the victims of intimate partner violence (588,490 total) and men accounted for approximately 15 percent of the victims (103,220 total).<sup>8</sup>
- While women are less likely than men to be victims of violent crimes overall, women are five to eight times more likely than men to be victimized by an intimate partner.<sup>9</sup>
- In 2001, intimate partner violence made up 20 percent of violent crime against women. The same year, intimate partners committed three percent of all violent crime against men.<sup>10</sup>
- As many as 324,000 women each year experience intimate partner violence during their pregnancy.<sup>11</sup>
- Women of all races are about equally vulnerable to violence by an intimate.<sup>12</sup>
- Male violence against women does much more damage than female violence against men; women are much more likely to be injured than men.<sup>13</sup>
- The most rapid growth in domestic relations caseloads is occurring in domestic violence filings. Between 1993 and 1995, 18 of 32 states with three year filing figures reported an increase of 20 percent or more.<sup>14</sup>
- Women are seven to 14 times more likely than men to report suffering severe physical assaults from an intimate partner.<sup>15</sup>

## **Domestic Homicides**

- On average, more than three women are murdered by their husbands or boyfriends in this country every day. In 2000, 1,247 women were killed by an intimate partner. The same year, 440 men were killed by an intimate partner.<sup>16</sup>
- Women are much more likely than men to be killed by an intimate partner. In 2000, intimate partner homicides accounted for 33.5 percent of the murders of women and less than four percent of the murders of men.<sup>17</sup>
- Pregnant and recently pregnant women are more likely to be victims of homicide than to die of any other cause<sup>18</sup>, and evidence exists that a significant proportion of all female homicide victims are killed by their intimate partners.<sup>19</sup>
- Research suggests that injury related deaths, including homicide and suicide, account for approximately one-third of all maternal mortality cases, while medical reasons make up the rest. But, homicide is the leading cause of death overall for pregnant women, followed by cancer, acute and chronic respiratory conditions, motor vehicle collisions and drug overdose, peripartum and postpartum cardiomyopathy, and suicide.<sup>20</sup>

## **Health Issues**

- The health-related costs of rape, physical assault, stalking and homicide committed by intimate partners exceed \$5.8 billion each year. Of that amount, nearly \$4.1 billion are for direct medical and mental health care services, and nearly \$1.8 billion are for the indirect costs of lost productivity or wages.<sup>21</sup>
- About half of all female victims of intimate violence report an injury of some type, and about 20 percent of them seek medical assistance.<sup>22</sup>
- Thirty-seven percent of women who sought treatment in emergency rooms for violence-related injuries in 1994 were injured by a current or former spouse, boyfriend or girlfriend.<sup>23</sup>

## **Domestic Violence and Youth**

- Approximately one in five female high school students reports being physically and/or sexually abused by a dating partner.<sup>24</sup>
- Eight percent of high school age girls said “yes” when asked if “a boyfriend or date has ever forced sex against your will.”<sup>25</sup>
- Forty percent of girls age 14 to 17 report knowing someone their age who has been hit or beaten by a boyfriend.<sup>26</sup>
- During the 1996-1997 school year, there were an estimated 4,000 incidents of rape or other types of sexual assault in public schools across the country.<sup>27</sup>

## **Domestic Violence and Children**

- In a national survey of more than 6,000 American families, 50 percent of the men who frequently assaulted their wives also frequently abused their children.<sup>28</sup>



- Slightly more than half of female victims of intimate violence live in households with children under age 12.<sup>29</sup>
- Studies suggest that between 3.3 - 10 million children witness some form of domestic violence annually.<sup>30</sup>

## Rape

- Three in four women (76 percent) who reported they had been raped and/or physically assaulted since age 18 said that a current or former husband, cohabiting partner, or date committed the assault.<sup>31</sup>
- One in five (21 percent) women reported she had been raped or physically or sexually assaulted in her lifetime.<sup>32</sup>
- Nearly one-fifth of women (18 percent) reported experiencing a completed or attempted rape at some time in their lives; one in 33 men (three percent) reported experiencing a completed or attempted rape at some time in their lives.<sup>33</sup>
- In 2000, 48 percent of the rapes/sexual assaults committed against people age 12 and over were reported to the police.<sup>34</sup>
- In 2001, 41,740 women were victims of rape/sexual assault committed by an intimate partner.<sup>35</sup>
- Rapes/sexual assaults committed by strangers are more likely to be reported to the police than rapes/sexual assaults committed by “nonstrangers,” including intimate partners, other relatives and friends or acquaintances. Between 1992 and 2000, 41 percent of the rapes/sexual assaults committed by strangers were reported to the police. During the same time period, 24 percent of the rapes/sexual assaults committed by an intimate were reported.<sup>36</sup>

## Stalking

- Annually in the United States, 503,485 women are stalked by an intimate partner.<sup>37</sup>
- Seventy-eight percent of stalking victims are women. Women are significantly more likely than men (60 percent and 30 percent, respectively) to be stalked by intimate partners.<sup>38</sup>
- Eighty percent of women who are stalked by former husbands are physically assaulted by that partner and 30 percent are sexually assaulted by that partner.<sup>39</sup>

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## APPENDIX B

### *SENATE, No. 1828*

Report of the [Senate Committee on Post Audit and Oversight](#) (under the provisions of [Section 63 of Chapter 3](#) of the General Laws, as most recently amended by Chapter 557 of the Acts of 1986) entitled "Guarding Our Children: A Review Ad Litem program within the probate and Family Court" (Senate, No. 1828).

### ***The Commonwealth of Massachusetts***



**In the Year Two Thousand.**

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### ***GUARDING OUR CHILDREN: A Review of Massachusetts' Guardian Ad Litem Program within the Probate and Family Court***

A Report of the  
[Senate Committee on Post Audit and Oversight](#)

**March 2001  
Massachusetts Senate**

The Honorable Thomas F. Birmingham  
Senate President

**[Senator Cheryl A. Jacques, Chair](#)**

[Senator Robert A. Havern III, Vice Chair](#)

[Senator Robert L. Hedlund](#)

[Senator Richard T. Moore](#)

[Senator Marc R. Pacheco](#)

[Senator Steven C. Panagiotakos](#)

[Senator Charles E. Shannon, Jr.](#)

# *Senate Committee on Post Audit and Oversight*

## **Senator Cheryl A. Jacques, Chair**

The Senate Committee on Post Audit and Oversight works to ensure that state government is accountable to the citizens of the Commonwealth. The Committee's charge is to monitor compliance with state laws, to act as a watchdog to protect taxpayers from waste and fraud, to evaluate the efficiency and effectiveness of state agencies and programs, and to recommend corrective actions through legislation, regulation, and administrative initiatives.

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## Highlights

- **Guardians Ad Litem (GALs) within the Probate and Family Court are appointed by a judge to investigate child custody cases and make recommendations to the court based on the child's best interests.**
- **Although GALs are called upon to make recommendations in the most difficult custody cases, Massachusetts does not ensure that GALs are properly trained to make critical decisions.**
- **GAL investigations and reports vary widely in thoroughness and content because no standards exist for how GALs should conduct their investigations or report their findings to the court.**
- **The GAL system in Massachusetts does not effectively incorporate the standards of the Presumption of Custody Law, which is designed to protect children from parents with a history of domestic violence.**
- **There is no widely understood process regarding how to file a complaint concerning a GAL.**

## Background

Last year more than 6,000 cases in the Probate and Family Court involved a Guardian Ad Litem (GAL). Many of these cases used a GAL to provide child custody recommendations, although GALs may be used in other situations as well, such as trust and estate cases. The presiding judge in a child custody case appoints a GAL when he or she determines that it is not possible to decide what is in the best interests of the child based solely on evidence and testimony presented in court. GALs are usually attorneys or clinicians and are most often appointed in difficult custody cases, frequently involving allegations of sexual or physical abuse of the child or spouse or substance abuse by a family member. Thousands of children caught in the middle of difficult divorce proceedings are impacted by the work of GALs every year.

In 1999, the Supreme Judicial Court (SJC) enacted Rule 1:07 in order to increase participation by women and minorities among fee-generating appointments in the courts, including GALs. Rule 1:07 created a rotating system that is now used to assign all GALs so that those on the list are appointed in sequential order unless a judge provides a written explanation for making an appointment out of order. Under Rule 1:07, each court within the state court system is required to establish general standards for listing individuals as potential court appointees. When a GAL is appointed, the judge outlines when the report is due, how many hours the GAL should work on the case, and what issues the GAL is to investigate.

The criteria to become a GAL in the Probate and Family Court are minimal, such as having sufficient malpractice insurance and being in good standing with the GAL's licensing board for their underlying profession. These minimal criteria do not address specific areas of expertise, for example, whether or not a GAL is qualified to identify

signs of physical or sexual abuse. Presently there is no structure in place to ensure that GALs entering the system from various professional backgrounds receive training in areas with which they are not familiar, but will encounter in their capacity as a GAL.

### **Family Abuse Impacts Children**

According to statistics from the National Abuse and Neglect Reporting System, an estimated 903,000 children were victims of maltreatment in 1998. Maltreatment includes physical and sexual abuse as well as neglect.

A 1989 Massachusetts Supreme Judicial Court Gender Bias Study found that boys who witness their father battering their mother are more likely to become abusers themselves. A 1996 Report of the Governor's Commission on Domestic Violence found that children witness more than two-thirds of partner abuse incidents. This same report found that the Department of Youth Services for the City of Boston reported that children of abused mothers are six times more likely to attempt suicide, 74% more likely to commit crimes against a person, 24 times more likely to have committed sexual assault crimes, and 50% more likely to abuse drugs or alcohol than children whose mothers are not battered.

In another study cited in the Journal of American Orthopsychiatry, researchers interviewed a sample of children who had witnessed one of their parents being physically abused. The study found that 85% of the children who had witnessed domestic violence had moderate to severe symptoms of Post Traumatic Stress Disorder.

## **Inadequate Training and Eligibility Guidelines**

To make informed and appropriate custody recommendations, a GAL must conduct an investigation to untangle layers of family relations and differing versions of events. Often GAL cases include allegations of domestic violence, sexual assault, or substance abuse by a family member. In order for a GAL to determine what is in the best interests of the child, he or she needs to thoroughly understand the issues involved in the particular case. Currently there is no mechanism to ensure a GAL who is trained in how to recognize signs of abuse will be appointed to a case involving allegations of such abuse.

### **Testing Travesty**

In a 1998 custody case before the Norfolk Probate Court, a GAL ordered and administered a psychological evaluation of a mother who was allegedly a victim of domestic violence. According to Dr. Maureen Carnes, expert witness in the case, and the authors of the psychological evaluation, the interpretation of the test's score needs to be adjusted if the person being tested has experienced trauma such as domestic violence. If the trauma is not factored into the interpretation of the score, the results can be skewed. For example, in this case the woman's test claimed she had pathological behavior. However, Dr. Carnes believed that the behavior was a result of the abuse and that the mother was not pathological. The GAL did not factor in the trauma experienced by the mother and used the skewed results of the test against the mother in the final GAL report.

In the past, GALs in Massachusetts have not been required to receive any specific "GAL training." However, beginning this year, the Probate and Family Court will require all GALs to participate in six hours of professional development training each year. This is still a minimal requirement. By comparison, the state of New Hampshire requires 20 hours of professional development training before a person can be certified as a GAL. The state of Minnesota, which is considered a national model for GAL systems, requires GALs to participate in 40 hours of specific GAL professional development training prior to their first appointment and 8 hours of training every year thereafter.

Lundy Bancroft, an expert in domestic violence issues and a practicing GAL in Massachusetts, recommends extensive training specifically in the area of domestic violence, since it is often a factor in child custody cases. Furthermore, Mr. Bancroft contends that in his experience GALs without specific domestic violence training often act in ways that put the children they are charged with protecting at risk and unwittingly re-traumatize domestic violence victims.

### **Going Without Guidelines**

The American Psychological Association has established guidelines for child custody evaluations in divorce proceedings. These guidelines include a recommendation that the evaluator have training, education, or experience in areas such as child and family development and the impact of divorce on children. In addition, child custody evaluators should have an understanding of applicable legal standards and procedures. Neither these nor any other guidelines have been adopted for use in the Massachusetts GAL system.



## **Lack of Standards for GAL Investigations and Reports**

GAL investigations and reports vary widely in thoroughness and content because no statewide standards exist for how GALs should conduct their investigations or report their findings back to the court. This lack of standards can create problems with the fairness and accuracy of a GAL's assessment. For example, although it is customary practice for a GAL to ask both parties for a list of people who they would like the GAL to speak with regarding the case, there are no guidelines describing who a GAL should interview or what questions the GAL should ask in order to make an accurate assessment of the custody situation. According to several attorneys interviewed by the Senate Committee on Post Audit and Oversight (Committee), some GAL reports are being filed without both parents even being interviewed.

### **Half of the Story**

In a 1999 custody case before the Suffolk Probate and Family Court, the mother alleged that her ex-husband physically abused her during their marriage. The GAL never interviewed the mother during his investigation. However, the GAL did interview the father, who denied abusing his ex-wife. Based solely on the father's statements, the GAL issued a report stating that there was no evidence of domestic violence and recommended that the father have joint custody of the child.

After completing an investigation, a GAL must submit a written report to the judge to help him or her determine custody or visitation for the child in question. However, according to a number of GALs interviewed by the Committee, there are no statewide standards for what must be included in a GAL report. Consequently, the completeness and thoroughness of these reports vary widely. The lack of standards for the reports can create serious due process concerns for the people involved in a case and jeopardize the soundness of the eventual custody decision.

In addition, without a consistent standard for what a report should include, it is difficult to evaluate the quality of a GAL's work. Furthermore, the court does not maintain adequate data documenting the total number of cases involving GALs or complaints about GALs. Without such documentation, there is no way to adequately evaluate the quality of a GAL's work or the effectiveness of the GAL system.

### **Visitation with an Alleged Sex Abuser**

In a current case before the Barnstable County Probate and Family Court, a GAL stated in his report that he believed the father had sexually assaulted his son. He made this conclusion based on a DSS investigation, an interview with the child's therapist, comments from the child's mother, and comments from the child himself. However, the father and the father's sister both maintained that the father had not sexually assaulted his son.

Despite the conclusion that the boy was sexually abused and that the father denied committing this crime, the GAL recommended that the father be allowed to visit his son and suggested that a family member could be an appropriate supervisor of the visitation. The GAL made no recommendation that the father seek professional counseling in regard to his allegedly assaulting his son. The judge ordered visitation for the father supervised only by the same sister who denied that the abuse had ever occurred.

While visitation with an abuser is sometimes considered by child psychologists to be beneficial, the circumstances under which it can be positive for the child require strict supervision and a recognition of the abuse from the abuser. In this case, neither circumstance was satisfied.

This story was first reported on WBZ Channel 4 by Joe Bergantino.

In 1998 the Legislature enacted the Presumption of Custody Act, establishing a standard that in custody cases a judge must presume that if a parent has abused the child or the other parent, it is in the best interests of the child to be placed with the non-abusive parent. Given this statutory requirement, it is troubling that GAL reports are not required to include evidence of domestic violence. This law was enacted because children who witness violence between their parents have higher rates of suicide, substance abuse, and emotional, cognitive, and behavioral difficulties. The lack of standards for GAL reports undermines the effectiveness of the Presumption of Custody Act because judges may be denied relevant information about domestic abuse.

### **Absent Abuse Evidence**

In a 1999 custody case before the Franklin County Probate and Family Court, a GAL recommended custody for the father, despite the mother presenting strong evidence that domestic violence had occurred while the couple was married.

In his report, the GAL concluded that abuse had not occurred. He based this finding in part on a conversation he claimed he had with the couple's former marriage counselor. However, the marriage counselor stated in an affidavit that the GAL never contacted him, and that the issue of domestic violence was raised in several sessions with the couple while they were still married.

During the Committee's interviews with GALs, a frequently mentioned concern was the lack of a forum to answer basic questions and explain particular procedures to GALs who are unclear about how to proceed with their investigation.

### **Missing Mentors**

There are no easily accessible resources to help a GAL determine how to resolve the common problem of two parents disagreeing on the role of the child in the investigation or other questions that can arise during a GAL investigation.

In a 1996 custody dispute involving a GAL, a disagreement arose between the parents about whether or not an attorney should be present during the GAL's interview with the child. There are no written guidelines on whether or not a GAL must allow counsel to be present during an interview with the child. In general, without guidelines on basic issues, questions like these must be resolved via a formal letter, a motion to the court, or by the GAL's sole determination. In this case, the GAL made a unilateral decision not to allow legal counsel to be present.

### **No Clear Complaint Process**

For the parties in a custody case, the Probate and Family Court process can be confusing. This already difficult process can become a nightmare if a party feels that a GAL appointed to the case has acted in an incompetent or biased manner. In such a situation, the dissatisfied party may not know where to turn for assistance. Although Committee interviews with the Chief Justice of the Probate and Family Court revealed that he will hear complaints about the process, many parties are unaware that they can bring a complaint to his attention. Furthermore, taking an issue to the highest level of the Probate and Family Court may seem intimidating for many people.

Currently, if a party in a case would like to file a complaint there are two choices: they can file a complaint with the presiding judge in the case or with the Chief Justice of the Probate and Family Court. During the Committee investigation, no attorney or GAL who was interviewed by the Committee was aware of any complaint process other than filing an objection about a GAL's conduct with the presiding judge. Presently, the Court does not provide parties or their attorneys with information regarding their rights when a GAL is appointed to their case or how they can file a complaint concerning a GAL. Many probate attorneys interviewed were reluctant to file a complaint with a presiding judge because they would likely come into contact with the GAL in future cases and were concerned about retribution.

The lack of a well-understood forum for resolving complaints specifically related to the GAL process creates numerous problems. First, parties can leave the Probate and Family Court feeling that the process was unfair and that justice was not served. Second, without a well-known system to address complaints about the conduct of GALs, allegations of bias, negligence, and incompetence may go unaddressed. Without a centralized complaint process and adequate record keeping, it is difficult for the court to identify specific areas where a GAL might require discipline or further training. In the most severe cases, it might be necessary to permanently disqualify a GAL.

## **National Perspective**

Florida and Minnesota stand out as role models for developing cohesive GAL programs. Florida recently redesigned its GAL system and produced a comprehensive manual for all GALs. The manual seeks to familiarize GALs with the Family Court system and the legal process, since many GALs are not attorneys. The manual outlines specific expectations of how a GAL should conduct an investigation, including who the GAL should meet and how to help children feel at ease during an interview. In addition, the manual specifies the appropriate structure for a GAL report.

The Florida and Minnesota systems present a sharp contrast to the Massachusetts GAL system. Both Florida and Minnesota require GALs to participate in extensive training prior to their first appointment in addition to attending annual training programs. Furthermore, both states have created systems with clear standards to assist GALs in doing their job and to allow the parties in a particular case to know what to expect from a GAL investigation and report.

## **Minnesota Wrestles with GAL System**

Minnesota used to have a splintered system where each district ran its own GAL program and the Family Court had a minimal role in overseeing the system. In 1997, the Minnesota Supreme Court revamped the GAL system at the request of the Legislature, due to an audit from the Legislative Audit Office. The audit highlighted many of the same issues raised in this report including lack of training, no statewide standards, and no uniform complaint process.

The Minnesota Supreme Court required the district courts to create full-time GAL administrator positions. The administrator is responsible for interviewing all prospective GALs and conducting a criminal background check on the prospective candidates. Minnesota also requires GALs to participate in a 40-hour training program before being appointed to their first case, and to participate in annual ongoing professional development training. Training programs include techniques on how to conduct an interview, how to identify domestic violence, and what components are required for a complete report.

Furthermore, the Minnesota GAL system promotes standards for how GALs are to conduct their investigations and evaluations. GALs are given a manual that provides a checklist of what they need to cover during the course of an investigation. In addition, the manual also provides guidelines for GAL reports. The GAL administrator also supervises GALs while they are working on a case. Finally, the administrator is responsible for investigating all complaints filed against GALs.

## **Findings**

### ***Progress at the Probate Court***

Over the past few years, the Probate and Family Court has taken several steps to improve the GAL system. For example, in 1998 Chief Justice Sean Dunphy of the Probate and Family Court issued an order to track the timeliness of GAL investigations. In addition, the Probate and Family Court has been working to successfully implement SJC Rule 1:07, which created a rotating system for all fee-generating appointments. As a result of Rule 1:07, the Probate and Family Court will mandate that all GALs participate in six hours of annual professional development training beginning in 2001. Furthermore, the Probate and Family Court informed the Committee that it hopes to create standards for GAL investigations and reports in 2002. As the Committee neared the completion of its review, Chief Justice Dunphy indicated that he plans to convene a committee of GALs and judges to address some of the continuing problems with the GAL system.

### ***Training and Eligibility***

- Although GALs are called upon to make recommendations in the most difficult custody cases, Massachusetts does not ensure that GALs are properly trained to make critical decisions.
- Other states can serve as role models for implementing training programs for GALs, including upfront training and continuing education. For example, both Minnesota and New Hampshire require significantly more training for their GALs than Massachusetts.

### ***Standards for Investigations and Reports***

- GAL investigations and reports vary widely in thoroughness and content because no statewide standards exist for how GALs should conduct their investigations or report their findings to the court. There are existing guidelines on child custody evaluations by organizations such as the American Psychological Association that could be adopted by Massachusetts.
- Other states have published manuals establishing clear standards for GAL investigations and reports. These states can serve as role models for Massachusetts.
- The GAL system in Massachusetts does not effectively incorporate the standards of the Presumption of Custody Law, which is designed to protect children from parents with a history of domestic violence.
- GALs lack an effective forum to ask basic questions about the investigation and report process.

### ***Complaint Process***

- There is no widely understood process regarding how to file a complaint against a GAL.
- Minimal record keeping hinders the Court's ability to evaluate the success or failure of individual GALs or to monitor the overall GAL system.

## **Recommendations**

### ***Training and Eligibility***

- The Probate and Family Court should establish thorough training and eligibility requirements for the GAL system, including:
  - A mandatory training program for all new GALs prior to being assigned to their first case, including training on domestic violence, substance abuse, and sexual assault; and
  - adequate mandatory annual professional development training.

### ***Standards for Investigations and Reports***

- The Probate and Family Court should develop clear guidelines describing how GAL investigations are to be conducted and what information reports should contain. Massachusetts should follow Florida and Minnesota's lead and publish a manual that outlines these standards.
- The standards must incorporate Massachusetts's statutory requirement that judges consider evidence of domestic violence when making custody and visitation determinations.
- The Probate and Family Court should establish an advisory committee of experts that GALs can contact to answer standard procedural questions that may arise during an investigation.

### ***Complaint Process***

- All parties to a custody dispute involving a GAL should be made aware of all avenues for filing a complaint.
- The Probate and Family Court should keep centralized records of all complaints filed against GALs and their resolution.

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## **APPENDIX**

### **Excerpts from Florida and Minnesota Manuals**

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### **MINNESOTA GUARDIAN AD LITEM PRE-SERVICE TRAINING CURRICULUM *GUARDIAN AD LITEM MANUAL***

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Prepared by  
Minnesota Supreme Court  
State Court Administrator's Office  
St. Paul, Minnesota

## **SECTION E: THE EFFECTS UPON CHILDREN OF DOMESTIC VIOLENCE**

Studies have repeatedly shown that children who are exposed to domestic violence display an increased level of distress in comparison to those children who have not been exposed to domestic violence. The degree of impairment is directly related to the level of violence experienced, as well as the child's age at the time of abuse. As we will see in this section, children who have witnessed domestic violence are very similar to children who have been direct victims of abuse.

The following scenarios may seem extreme but, in fact, they are all too common:

- A seven year old boy, fearing for his mother's safety, jumps from a second story window to get help. When the police arrive they find a neighbor stabbed and the boy's mother seriously injured by the mother's ex-spouse.
- A ten year old girl tries to physically break up her parents' fight. She is thrown from the fight and hits the radiator. As a result one of her vertebrae breaks and she is paralyzed from the waist down.

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Violence between the adult partners in a home is a reality that can not be ignored. An even greater need is to understand and realize the impact of such violence on child witnesses.

Children may be affected by family violence in any of the following ways. Keep in mind that you should look for a combination of behaviors, extremes or repeated behaviors.

### **BEHAVIORAL**

- Acting out or withdrawn
- Overachieving or underachieving
- Refusing to go to school (afraid to leave home because they feel they need to stay at home to take care of things)
- Caretaking (filling adult roles)
- Aggressive or passive
- Very rigid defenses
- Constantly seeking attention, often labeled ADHD
- Bedwetting
- Nightmares
- Difficult to set limits
- Hitting adults



- Pre-delinquent and delinquent
- Limited tolerance
- Developmental regression

## **EMOTIONAL**

- Guilt
- Shame
- Fear
- Anger
- Confusion
- Depressed
- Burdened
- Grief
- Insecure

## **PHYSICAL**

- Somatic complaints (i.e., headaches, stomach aches)
- Nervous, anxious
- Short attention span
- Tired, lethargic (seems lazy)
- Often sick
- Neglectful of personal hygiene
- No reaction, at times, to physical pain

## **SOCIAL**

- Isolated; few friends
- Overly social
- Relationships with playmates may start with great intensity and end abruptly
- Difficulty in trusting others
- Poor conflict resolution skills
- Unwilling to share or compromise
- May be passive or bullying with playmates
- Unclear sense of boundaries
- Poor image or anything that is stereotypically female

***GUARDIAN AD LITEM MANUAL    PAGES 58 - 59    UNIT 7: DYNAMICS OF ABUSE AND VIOLENCE***

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## **WORKING WITH VICTIMS AND ABUSERS**

As a GAL you will hear very conflicting sides of the story when you work with families experiencing domestic violence. Often the abuser is very cooperative -- remember that this person generally starts out a relationship with charm. This is not much different than the child who is growing up in an abusive home who initiates play relationships with great intensity and then the relationships end abruptly. It is not surprising that the majority of abusers grew up in homes where there was abuse. On the other hand, the victim may be less cooperative and may present herself or himself poorly. For the victim who is in court fighting over custody and visitation, all of her/his fears of losing the children feel like they will come true. Keep in mind that the abuser has told the victim that no one will believe him/her.

We also need to understand how traumatic this experience can be for the child, especially when the child has also been threatened. For example, the father of one eight-year-old child threatened to kill the child if he spoke even one word about the abuse. The child in turn elected to become mute rather than risk losing his life. It took six months of therapy before this child shared a few words.

As we will discuss later, it is important that you present yourself as a neutral individual; involved only to determine what is in the best interest of the child. If the victim or the abuser feel that you are spending more time with the other partner, you will find your job more complicated.

When making recommendations in cases involving domestic violence, it is important to remember that in general joint custody arrangements do not work well in families that have a history of domestic violence. When determining a visitation schedule, consider the following items:

- The safety of the victim and children.
- Assess how lethal the situation may be for the victim and children.
- Whether the victim will remain safe when the children are transferred from one residence to the other.
- Whether visits should be suspended or supervised? Does your community have a supervised visitation center?
- What safety plan has been developed for the victim and children; are the children old enough to comprehend and respond to a safety plan?
- Has the abuser taken responsibility for his or her behavior?
- How have the children responded to the violence; what is their level of fear or anxiety regarding visitation with the abuser?
- Is there a risk of parental abduction?

## Florida GAL Training Manual

### Who Should the GAL interview?

In your role as a GAL, you are expected to collect and review information on the case. In the course of collecting information you will want to talk with a number of individuals who have information about the child. In this section, we will identify the individuals you will most likely meet in the course of researching a case.

- We will discuss the reasons you would have for meeting and interviewing these individuals.
- We will also discuss the kind of information various professionals can provide about the child and the kind of information you may need to share with them.

The most obvious person you would interview is the child or children in the case. You will also interview professionals on the case, including:

- DCF Protective Investigators
- DCF Protective Service Counselor
- Foster Care Counselors
- Attorneys
- Foster Parents, if the child is out of the home.
- Teachers
- Medical Personnel
- Psychologists/Psychiatrists
- Day care Providers
- Law Enforcement

#### **Other people who know the child should be interviewed, such as:**

- Parents
  - Siblings
  - Legal guardians
  - Extended family members
  - Friends
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